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THE SUPREME COURT'S CONSTRUCTION OF THE FEDERAL CONSTITUTION IN 1920-1921, V[1]

VIII. JURISDICTION AND PROCEDURE OF COURTS[2]

1. *The Extent of Federal Judicial Power*

(a) Cases Arising under the Constitution or Laws of the United States.

The question whether a case presents a "federal question," so called, is raised in a number of the controversies in which the

[1] For the preceding instalments, see 20 MICH. L. REV. 1-23, 135-172, 261-288, 381-406 (November, 1921—February, 1922).

[2] Various aspects of judicial review of the constitutionality of legislation are considered in Orrin N. Carter, "Constitutional Decisions of Justice Cartwright," 15 ILL. L. REV. 237; Robert Eugene Cushman, "Constitutional Decisions by a Bare Majority of the Court," 19 MICH. L. REV. 771, and "Marshall and the Constitution," 5 MINN. L. REV. 1; W. F. Dodd, "Presentation of Constitutional Questions in Illinois," 3 ILL. L. BULL. 111; F. W. Grinnell, "Some Forgotten History About the Duty of Courts in Dealing with Unconstitutional Legislation," 54 AMER. L. REV. 419; Wm. H. Lloyd, "Pylkington's Case and Its Successors," 69 U. PA. L. REV. 20; Fred A. Maynard, "Five to Four Decisions of the Supreme Court of the United States," 54 AMER. L. REV. 481; Francis Newton Thorpe, "Hamilton's Ideas in Marshall's Decisions," 1 BOSTON U. L. REV. 60; John Barker Waite, "Public Policy and Personal Opinion," 19 MICH. L. REV. 265; and notes in 21 COLUM. L. REV. 288 on jurisdiction to pass on constitutionality of initiatory petition, in 34 HARV. L. REV. 86 on what persons are entitled to raise the issue of unconstitutionality, and in 5 MINN. L. REV. 81 on whether court can review legislative declaration that law is an emergency measure not subject to referendum.

For discussion of declaratory judgments, see Edwin M. Borchard, "The Uniform Act on Declaratory Judgments," 34 HARV. L. REV. 697; W. F. Dodd, "Michigan Declaratory Judgment Decision," 6 A. B. A. JOUR. 145; Maurice

asserted federal question was considered and answered. Only a few of these instances need special mention. In *Hartford Life Ins. Co.* v. *Blincoe*,[3] after reversal by the Supreme Court of a state judgment against a defendant, a second judgment was rendered by the state court on different grounds. These included holding an assessment on an insurance policy to be void for the inclusion of a state tax not legally due. On the second advent of the case to the Supreme Court it was held that no federal question was presented by the state decision as to the amount of the tax or on the issue whether the company was doing business on the assessment or the premium plan. In *Missouri Pacific Ry. Co.* v. *McGrew Coal Co.*[4] the refusal of a state court, in a suit founded on a state long- and short-haul statute, to dismiss the action of the shipper because he did not pay the freight and was not damaged, was held to raise no substantial federal question, but only a question of state law which the Supreme Court has no jurisdiction to review. In *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Washburn Coal Co.*[5] a state judgment denying a carrier an action against a shipper for freight in excess of the statutory rate subsequently declared confiscatory was affirmed on the theory that it rested on grounds of contract law which raised no federal question so long as the state court did not sustain the statutory rate as valid. In *Bullock* v. *Florida*[6] a state decision that a railroad may not abandon operations without the consent of the state was held to raise a federal question, but

E. Harrison, "California Legislation of 1921 Providing for Declaratory Relief," 9 CALIF. L. REV. 359; James Schoonmaker, "Declaratory Judgment," 5 MINN. L. REV. 32, 172; and notes in 21 COLUM. L. REV. 168, 19 MICH. L. REV. 86, and 30 YALE L. J. 161, 204. The duty to give advisory opinions is treated in 34 HARV. L. REV. 673.

Special courts for special purposes are considered in Henry B. Higgins, "A New Province for Law and Order," 34 HARV. L. REV. 105; H. W. Humble, "The Court of Industrial Relations in Kansas," 19 MICH. L. REV. 675; William Reynolds Vance, "The Kansas Court of Industrial Relations with Its Background," 30 YALE L. J. 456; Edward F. Waite, "Courts of Domestic Relations," 5 MINN. L. REV. 161; J. S. Young, "Industrial Courts with Special Reference to the Kansas Experiment," 5 MINN. L. REV. 39, 185, 353; and a note in 20 COLUM. L. REV. 901 on small claims courts

[3] 255 U. S. 129, 41 Sup. Ct. (1921), 20 MICH. L. REV. 267.

[4] 256 U. S. 134, 41 Sup. Ct. 404 (1921).

[5] 254 U. S. 370, 41 Sup. Ct. 140 (1920), 20 MICH. L. REV. 282.

[6] 254 U. S. 513, 41 Sup. Ct. 193 (1921), 20 MICH. L. REV. 286.

the issue whether a state would be bound by a foreclosure decree was declared to be purely a question of local law. In *Marshall* v. *New York*[7] the issue whether a lien for taxes given by the common law of New York is a prerogative right or merely a rule of administration was held to be one of local law on which the federal courts will accept as conclusive the decisions of the New York courts. On the other hand, *Missouri Pacific Ry. Co.* v. *Ault*[8] held that in an action against the director general of railroads in which the Act of Congress permitting the application of state police laws was construed not to include laws imposing a penalty, the question whether a state provision is penal or compensatory is one of federal law and not of state law.

In the foregoing cases federal jurisdiction over the controversy was not dependent solely on the particular issues mentioned. In two cases, however, efforts to initiate proceedings in the federal courts were frustrated for entire lack of federal jurisdiction. In *Vallely* v. *Northern Fire & Marine Ins. Co.*[9] an insurance company without objection on its part was adjudged a bankrupt by the district court. It was undisputed that the company was an insurance company and that the bankruptcy law does not apply to insurance companies. The Supreme Court held therefore that the case did not arise under a law of the United States and that the district court was without jurisdiction, differentiating the situation from cases where the question is whether the bankrupt is chiefly engaged in farming or whether there is diversity of citizenship, in which cases there is jurisdiction to decide the question and in which an erroneous decision may be binding if not appealed from.

Niles-Bement-Pond Co. v. *Iron Moulders' Union*[10] was a proceeding to enjoin a labor union. References in the bill to the fact that the contracts interfered with by the striking defendants were for supplies for the United States government and involved interstate commerce were said by Mr. Justice Clarke to be "much too casual and meager to give serious color to the claim now made that the cause of action asserted is one arising under the laws of the

[7] 254 U. S. 380, 41 Sup. Ct. 143 (1920).
[8] 256 U. S. —, 41 Sup. Ct. 593 (1921).
[9] 254 U. S. 348, 41 Sup. Ct. 116 (1920).
[10] 254 U. S. 77, 41 Sup. Ct. 39 (1920).

United States," and the contention was characterized as "an afterthought" and plainly not in the mind of the writer of the bill of complaint. Justices Pitney and McReynolds dissented, but without indicating whether it was on this issue or on the further holding that jurisdiction did not exist on account of diversity of citizenship.

In *Stark Brothers Nurseries & Orchards Co.* v. *Stark*[11] there was federal jurisdiction to award damages for infringement of a trademark registered under the Act of Congress to the extent that such damages arose after notice to the infringer. This was held to be the only cause of action arising under the federal statute so that the district court was without jurisdiction to award damages for infringement prior to such notice.

A suit against a federal reserve bank was held in *American Bank & Trust Co.* v. *Federal Reserve Bank*[12] to be one arising under the laws of the United States, since it has long been established that this is the nature of a suit against a defendant incorporated by the United States. As to the contention that the suit was not within the Judicial Code of 1911, Mr. Justice Holmes remarked:

> "The contrary is established, and the accepted doctrine is intelligible at least since it is part of the plaintiff's case that the defendant bank existed and exists as an entity capable of committing the wrong alleged and of being sued. These facts depend upon the laws of the United States."

Provisions in the Judicial Code making national banking associations, for the purposes of suit against them, citizens of the states in which they are respectively located were held not to apply to the federal reserve banks created after the Code was enacted.

There was difference of opinion in *Smith* v. *Kansas City Title & Trust Co.*[13] as to whether a suit to enjoin a state bank from purchasing bonds issued by the federal farm loan banks was a suit arising under the laws or Constitution of the United States. The federal questions in the case were whether Congress had power to create the farm loan banks and to exempt their assets from state taxation. For himself and Mr. Justice McReynolds, Mr. Justice

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[11] 255 U. S. 50, 41 Sup. Ct. 221 (1921).
[12] 256 U. S. —, 41 Sup. Ct. 499 (1921).
[13] 255 U. S. 180, 41 Sup. Ct. 243 (1921), 20 MICH. L. REV. 18-20.

Holmes insisted that the legality of the investment was material only because made so by the state law creating the state bank and restricting its powers of investment. The Missouri law therefore created the cause of action and a suit cannot arise under any other law than that which creates the cause of action. The federal law, he continued, "must create at least a part of the cause of action by its own force, for it is the suit, not a question in the suit, that must arise under the law of the United States." For the majority, Mr. Justice Day invoked the broader principle that where it appears from the bill "that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under this provision." He relied also on quotations from Chief Justice Marshall that a case "may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon a construction of either" and when "the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction."

Other issues of federal jurisdiction were wholly statutory or depended on common law principles. Among them are the right to award costs after the dispute has become moot,[14] and such questions as whether the decision below is a final one,[15] whether the jurisdiction of the district court as a federal court was involved so that there may be direct appeal to the Supreme Court,[16] whether under the mandate of the Supreme Court the district court may retain jurisdiction,[17] and whether under the Lever Act a district court in passing on claims for the requisition of supplies sits as a court of claims so that a direct writ of error lies from the Supreme Court.[18]

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[14] Heitmuller v. Stokes, 256 U. S. —, 41 Sup. Ct. 522 (1921).

[15] Baldwin Co. v. Howard Co., 256 U. S. 35, 41 Sup. Ct. 405 (1921); American Steel Foundries v. Whitehead, 256 U. S. 40, 41 Sup. Ct. 407 (1921).

[16] De Rees v. Costaguta, 254 U. S. 166, 41 Sup. Ct. 69 (1920); Louie v. United States, 254 U. S. 548, 41 Sup. Ct. 188 (1921).

[17] Ex parte Lincoln Gas & Electric Light Co., 256 U. S. —, 41 Sup. Ct. 558 (1921).

[18] United States v. Pfitsch, 256 U. S. —, 41 Sup. Ct. 569 (1921).

(b) Controversies between Citizens of Different States.

Federal jurisdiction was denied in *Niles-Bement-Pond Co.* v. *Iron Moulders' Union*,[19] in which a New Jersey corporation sued an Ohio corporation and Ohio members of a labor union, because it appeared that the defendant Ohio corporation was completely controlled by the plaintiff New Jersey corporation and that there was no substantial controversy or "collision of interest" between the two, so that on the basis of real interest the two corporations should be aligned as plaintiffs, which would make one of the plaintiffs a citizen of the same state as the defendants.[20]

An apparent if not real exception to the rule invoked in the preceding case is illustrated by *Supreme Tribe of Ben Hur* v. *Cauble*.[21] This was a suit in the federal court to enjoin a state action by Indiana citizens against an Indiana mutual benefit society. The basis of the request for the injunction was that the matter in issue had previously been concluded in a "class-suit" brought in the federal court by non-Indiana citizens against the Indiana society. Jurisdiction of the present proceeding was sustained as ancillary to the prior class-suit. The Indiana citizens contended that had they really been parties to the prior suit federal jurisdiction on account of diversity of citizenship would have been defeated, and that the fact that it had been entertained established that they were not necessary parties and therefore were not bound by the decree. The court's rejection of the contention involves the holding that if there is the requisite diversity of citizenship between the nominal parties to a class suit, federal jurisdiction is not defeated because other persons having identity of interest with the plaintiffs are citizens of the same state as the defendant even though the nominal plaintiffs represent the interests of those not included so as to conclude them by the result of the litigation. The situation involves the dilemma that class suits fail in their purpose unless they bind

[19] Note 10, *supra*. See 6 VA. L. REG. n. s. 692.

[20] In 20 COLUM. L. REV. 917 is a note on a case holding that an insane person is not the real party in interest in a suit brought by his committee and that therefore the citizenship of the latter and not of the former determines whether suit can be brought in the federal courts on account of diversity of citizenship.

[21] 255 U. S. 356, 41 Sup. Ct. 338 (1921). See 21 COLUM. L. REV. 487 and 19 MICH. L. REV. 759.

all members of the class, including those who are fellow citizens of the defendant, and that class suits can seldom be instituted in the federal courts on the ground of diversity of citizenship if jurisdiction is defeated whenever any member of the class is a fellow citizen of the defendant. Support for the choice of the horn seized was found in a rule of the court which appeared to authorize it and in the inconvenience of the opposite result.

So far as the Constitution is concerned there is no limitation as to the law which federal courts shall apply in controversies between citizens of different states. Congress, however, has provided that, subject to certain exceptions, the laws of the several states shall be regarded as the rules of decision in trials at common law, in the courts of the United States, in cases where they apply. In interpreting this provision decisions of a state court on questions of "general jurisprudence" are not accepted by the federal courts as conclusive evidence of the law of the state. In proceedings in equity, which are not within the terms of the federal statute, federal courts assume even greater latitude in deciding for themselves what is the law of the state. A striking instance of this appears in *Wells-Fargo & Co.* v. *Taylor*.[22] This was a bill brought in a federal court by reason of diversity of citizenship to enjoin a successful plaintiff in a state court from taking any steps to enforce his state judgment. The plaintiff in the original action was an employee of an express company and the defendant was the railroad held by the state court to be responsible for his injury. The express company's interest in the matter was due to its obligation to indemnify the railroad company. It comes into the federal court and gets an injunction against enforcing the state judgment on the ground that its employee had stipulated with it that he assumed the risk of injury and that this stipulation makes it against equity and good conscience for him to enforce a judgment obtained in disregard of it, it being previously established that the federal statute prohibiting the federal courts from granting injunctions to stay proceedings in state courts does not apply to prevent the enforcement of judgments obtained against equity and good conscience. The stipulation which it was against equity and good conscience to disregard was one which the Federal Employers' Liability Act, if applicable,

[22] 254 U. S. 175, 41 Sup. Ct. 93 (1920).

would render of no effect. After holding that the Liability Act does not apply to employees of express companies, since they are not "common carriers by railroad," Mr. Justice Van Devanter declares that "it follows that the act has no bearing on the liability of either company or on the validity of the messenger's agreement." This apparently negatives any implication that Congress had taken over the regulation of liability for the injury in question so as to preclude the further application of state law. Mr. Justice Van Devanter goes on to say that "there being no statute regulating the subject, it is settled by the decisions of this court, and is recognized in other jurisdictions, that the messenger's agreement was a valid and binding contract." The decisions cited in support do not include any from Mississippi, the state in which the offensive judgment was rendered. The decision of the Supreme Court, therefore, seems to mean that if a state court in affirming a state judgment applies a common-law rule in the realm of general jurisprudence which is not to the taste of the United States Supreme Court, the advantage of the state judgment may be taken away by a federal court which gets jurisdiction by reason of diversity of citizenship at the suit of an interested third party. If the decision means anything less than this, the restriction is dependent upon elements in the situation not adverted to in Mr. Justice Van Devanter's opinion.

(c) Admiralty and Maritime Jurisdiction.

The "settled rule" that "a contract for the complete construction of a ship or supplying materials therefor is non-maritime and not within the admiralty jurisdiction" was adduced in *Thames Towboat Co.* v. *The Francis McDonald*[23] to justify the exclusion from that jurisdiction of a suit on a contract for completing a ship after the hull had been put into the water.

That the admiralty jurisdiction does not extend to suits in substance against a state was held in two cases. *In re State of New York (Petition of Walsh)*[24] was a libel *in rem* against a ship owned privately but chartered to the superintendent of public works of New York, against whom the owners secured the issue of a monition. Against this monition the Supreme Court issued a prohibition

[23] 254 U. S. 242, 41 Sup. Ct. 65 (1920).

[24] 256 U. S. —, 41 Sup. Ct. 588 (1921). See 21 COLUM. L. REV. 718.

on the ground that it was an attempt to bring an action *in personam* in substance against the state. The contention that this result enabled New York to impose its local law upon the admiralty jurisdiction to the detriment of the characteristic symmetry and uniformity of the rules of maritime law was answered by saying that "it is not inconsistent with this principle to accord to the states, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction." *In re State of New York (The Queen City)*[25] was a libel *in rem* against a tug owned by the state. Mr. Justice Pitney declared that "the principle so uniformly held to exempt the property of municipal corporations employed for public and governmental purposes from seizure by admiralty process *in rem* applies with even greater force to exempt public property of a state used and employed for public and governmental purposes."[26]

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[25] 256 U. S. —, 41 Sup. Ct. 592 (1921).

[26] Four cases involving ships in which foreign governments claimed some proprietary interest were treated as raising questions of the construction of the federal statute defining jurisdiction in admiralty, without any suggestion that they might be without the jurisdiction possible under the Constitution. In re Hussein Lutfi Bey, 256 U. S. —, 41 Sup. Ct. 609 (1921), declined to issue a writ of prohibition restraining the district court from libelling a ship owned by the Turkish government and used for commercial purposes, giving as a reason that it is far from plain that there is absence of jurisdiction, so that the issue would not be determined on application for prohibition, since when the question of jurisdiction is doubtful the granting or withholding of a writ of prohibition is discretionary. The same attitude was taken in Ex Parte Muir, 254 U. S. 522, 41 Sup. Ct. 185 (1921), commented on in 34 HARV. L. REV. 782, 16 ILL. L. REV. 247, and 69 U. PA. L. REV. 385, in which private counsel for the British embassy sought a writ of prohibition against a libel of a privately owned vessel alleged by him to be an admiralty transport in the service of the British government. While Mr. Justice Van Devanter remarked that the British government is entitled as of right to appear in the suit and raise the jurisdictional question, he suggested that it is better practice to make the asserted immunity of the vessel a subject of diplomatic representations so that the executive department may pass on the claim and make what it thinks the appropriate suggestion to the court. In The Pesaro, 255 U. S. 216, 41 Sup. Ct. 308 (1921), the district court had, on the suggestion of the Italian ambassador that the ship in question was owned by his government, dismissed the libel. This was held erroneous on the ground that the suggestion, to be entertained,

(d) Controversies between Two or More States.

New York v. *New Jersey*[27] was a suit to enjoin the pollution of the waters of New York bay by the discharge of sewage. While it does not appear that the defendant denied the jurisdiction of the United States Supreme Court, the court takes pains to point out explicitly that the jurisdiction obtains. After remarking that New York, for the purpose of showing its right to maintain the suit, set forth an agreement between it and New Jersey fixing the boundary between the two states and giving to New York, to an extent agreed, exclusive jurisdiction over the waters of the Bay of New York, Mr. Justice Clarke continues:

> "But we need not inquire curiously as to the rights of the state of New York derived from this compact, for, wholly aside from it, and regardless of the precise location of the boundary line, the right of the state to maintain such a suit as is stated in the bill is very clear. The health, comfort and prosperity of the people of the state and the value of their property being gravely menaced, as it is averred that they are by the proposed action of the defendants, the state is the proper party to represent and defend such rights by resort to the remedy of an original suit in this court under the provisions of the Constitution of the United States."

While there was no doubt as to the jurisdiction of the court, Mr. Justice Clarke observed that such problems as the adjustment of

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should come through official channels of the United States. The subsequent decision of the district court is discussed in 35 HARV. L. REV. 330, 337. The same issue was involved in The Carlo Poma, 255 U. S. 219, 41 Sup. Ct. 309 (1921), but the action taken was to vacate the decision of the Circuit Court of Appeals and to remand the case to it with orders to dismiss the appeal from the district court, since, the issue being one of jurisdiction, the only appeal was direct to the Supreme Court. Several of the cases reviewed in this paragraph are considered in J. Whitla Stinson, "The Requisitioned and the Government-owned Ship," 20 MICH. L. REV. 407.

Other questions of admiralty jurisdiction are discussed in J. Whitla Stinson, "Admiralty and Maritime Jurisdiction of the Courts of Great Britain, France and the United States," 16 ILL. L. REV. 1; and in a note in 15 ILL. L. REV. 465 on the enforcement in admiralty of a state statute giving action for wrongful death.

[27] 256 U. S. —, 41 Sup. Ct. 492 (1921). See 35 HARV. L. REV. 322.

disputes over sewage are more likely to be solved by wise coöperation between the states involved than by proceedings in any court, however constituted. The court did not share New York's apprehension as to the danger of pollution and so denied the injunction, but without prejudice to the filing of another bill.

Various aspects of boundary controversies were treated in *Oklahoma* v. *Texas,*[28] *Oklahoma* v. *Texas,*[29] and *Arkansas* v. *Mississippi,*[30] in none of which was there any issue as to the jurisdiction of the court.

(e) Suits against a State or the United States.

The reasons why a state is exempt from suit are reviewed by Mr. Justice Pitney in *In re State of New York (Petition of Walsh).*[31] While the Eleventh Amendment in terms forbids only suits in law or equity brought against a state by a citizen of another state, this special wording "was the outcome of a purpose to set aside the effect of the decision" in *Chisholm* v. *Georgia;* and in *Hans* v. *Louisiana* "the court demonstrated the impropriety of construing the amendment so as to leave it open for citizens to sue their own state in the federal courts; and it seems to us equally clear that it cannot with propriety be construed to leave open a suit against a state in the admiralty jurisdiction by individuals, whether its own citizens or not." This, it is to be noted, goes no further than to say that the Eleventh Amendment does not impliedly authorize the suits against a state that it fails explicitly to forbid. The real basis of the decision holding a state entirely exempt from the jurisdiction of the federal court is a general principle opposed to the line of thought in *Chisholm* v. *Georgia.* As Mr. Justice Pitney puts it:

> "That a state may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain

[28] 256 U. S. 70, 41 Sup. Ct. 420 (1921).
[29] 256 U. S. —, 41 Sup. Ct. 539 (1921).
[30] 256 U. S. 28, 41 Sup. Ct. 444 (1921).
[31] Note 24, *supra.*

> a suit brought by private parties against a state without consent given; nor one brought by citizens of another state, or by citizens or subjects of a foreign state, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the amendment is but an exemplification."

The question whether a suit is one against a state "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record." Suits against a state are "not confined to cases where the suit will operate so as to compel the state specifically to perform its contracts," but include also "such as will require it to make pecuniary satisfaction for any liability." In the case at bar the superintendent of public works would be affected in his official capacity and not otherwise and the effect of any decree "would expend itself upon the people of the state of New York in their public and corporate capacity." This decision was followed in *In re State of New York (The Queen City)*,[32] in which a writ of prohibition was issued against a libel *in rem* against a ship owned by the state.

In *Port of Seattle* v. *Oregon & W. R. Co.*[33] a municipal corporation which had brought a suit in a state court to quiet title to a parcel of land objected to removal of the case to the federal court on the ground of diversity of citizenship because, as it contended, the land in question was owned by the state, which was therefore the real party in interest. To this the court answered that the municipality has an independent financial interest in the controversy, that suit against it would not be prevented by the Eleventh Amendment, and that there is no occasion to consider what effect the judgment in the case would have upon the state's interest. Doubtless this result was reached the more readily because the litigation on its merits was decided in favor of the municipality.[34]

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[32] Note 25, *supra*.

[33] 255 U. S. 56, 41 Sup. Ct. 237 (1921).

[34] The holding on the main issue was that the rights acquired by a grantee of the state in lands adjoining a waterway depend wholly upon state law, and that the company's claim that it was entitled to continued access to the waterway was unsupported by the law of the state of Washington.

In the preceding cases it is recognized that suits against state officers acting under an unconstitutional statute are not suits against a state. This finds illustration in *San Antonio* v. *San Antonio Public Service Commission*,[35] in which it is observed that a federal court has jurisdiction to enjoin a rate prescribed by a state which is admittedly confiscatory.

The same principle applies to suits against federal officers. In *Payne* v. *Central Pacific Ry. Co.*[36] a suit to enjoin the secretary of the interior from cancelling a selection of indemnity lands was held not a suit against the United States when the selection is valid and the secretary's threatened cancellation is based on a misconception of his authority. So also in *Kennington* v. *Palmer*[37] an injunction restraining the attorney general from enforcing the unconstitutional provisions of the Lever Act was ordered by the Supreme Court after the lower court had dismissed the bill on the ground that the plaintiff had an adequate remedy at law. That the suit was not one against the United States was assumed without discussion, Chief Justice White contenting himself with saying that "as it is no longer open to deny that the averments of unconstitutionality which were relied upon, if well founded, justified equitable relief under their bill, and because the opinion in the *Cohen* case has conclusively settled that they were well founded, it follows that the court below was wrong." The cases adduced in support were ones in which the Supreme Court had previously determined the constitutionality or unconstitutionality of statutes in proceedings to enjoin officers from enforcing or threatening to enforce the criminal provisions of the law, but in which the propriety of the remedy was not given explicit consideration by the Supreme Court. This important method of securing an early adjudication of constitutional issues now receives explicit sanction.

The principle that the United States cannot be sued without its consent is applied in *Missouri Pacific R. Co.* v. *Ault*[38] to reverse a judgment against the director general of railroads for a penalty provided by state law for delay in paying to an employee the wages

[35] 255 U. S. 547, 41 Sup. Ct. 428 (1921), 20 MICH. L. REV. 281.
[36] 255 U. S. 228, 41 Sup. Ct. 314 (1921).
[37] 255 U. S. 100, 41 Sup. Ct. 303 (1921), 20 MICH. L. REV. 9.
[38] 256 U. S. —, 41 Sup. Ct. 593 (1921).

due at the time of his discharge. The government had consented to be sued and had provided that the lawful police regulations of the states should continue unimpaired while the roads were under federal control. Notwithstanding this, it was held that there was nothing in the purpose or spirit of the act "to indicate that Congress intended to authorize suit against the government for a penalty, if it should fail to perform the legal obligation imposed."[39]

2. *Requisites of Jurisdiction Over Defendant*

The railroad made defendant in *Vicksburg, S. & P. Ry. Co.* v. *Anderson-Tully Co.*[40] objected that the district in which suit was brought was not one "through which the road of the carrier runs" within the meaning of the Interstate Commerce Act and that the person on whom process was served was not its agent. On the latter issue the return of the marshal was held conclusive in the absence of any evidence to controvert it other than the stipulation that the road was under federal control at the time. For all this, says Mr. Justice Clarke, the person served might have been the agent of the defendant as well as of the government. On the statutory issue of venue, the defendant was held to be running its road in the district when it ran its cars therein over the line of another road for which it paid on a mileage basis. This arrangement was held to make it substantially a lessee.[41]

3. *Procedural Requirements*

An ancient Delaware statute which prevented non-residents from defending on the merits suits begun against them by attachment of property, unless they filed a bond to the value of the property, was

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[39] The statutes authorizing suits against the government are reviewed in United States v. Pfitsch, note 18, *supra*. In 8 CALIF. L. REV. 342 is a note on the corporate entity in government-owned corporations; in 15 ILL. L. REV. 399 one on the liability of the railroads to be sued when under government control.

[40] 256 U. S. —, 41 Sup. Ct. 524 (1921).

[41] For notes on questions of jurisdiction over defendants, see 9 CALIF. L. REV. 74 on the effect of a general appearance after judgment, in 21 COLUM. L. REV. 286 on jurisdiction over debtor by service on agent, in 21 COLUM. L. REV. 362 on when a foreign corporation is doing business in a

sustained in *Ownbey* v. *Morgan*[42] against the complaints that it took property without due process of law, denied the equal protection of the laws and abridged the immunities of citizens of the United States. The third objection was answered by invoking the principle that the immunities protected are "only such as owe their existence to the federal government, its national character, its Constitution, or its laws." The equal-protection complaint was predicated on the fact that foreign corporations might appear and defend without giving security, but this distinction the court thought reasonable. Respect for age saved the statute under the due process clause. The provision was descended from the Custom of London, it had relatives in other states in times past, it belonged to "a time honored method of procedure" and was a "time-honored requirement of security," and the state in adopting it had adhered "logically to the ancient distinction between a proceeding *quasi in rem* and an action *in personam*." The general and special considerations militating against declaring such a Methuselah an outlaw under the due-process clause are put by Mr. Justice Pitney as follows:

> "The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall. It restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial proceedings. But a property owner who absents himself from the territorial jurisdiction of a state, leaving his property within it, must be deemed *ex necessitate* to consent that a

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state, and 21 COLUM. L. REV. 494 on jurisdiction by service on a person within the state to attend court.

Questions somewhat analogous are considered in Albert Levitt, "The Domicile of a Married Woman," 91 CENT. L. J. 4, 24; Alex. Simpson, Jr., "What Constitutes a Voting Residence in Pennsylvania," 69 U. PA. L. REV. 1; and notes on the domicil of a married woman in 21 COLUM. L. REV. 488 and 30 YALE L. J. 631, and on the power of equity to deal with a *res* in a foreign jurisdiction in 30 YALE L. J. 865.

[42] 256 U. S. 94, 41 Sup. Ct. 433 (1921). See 19 MICH. L. REV. 853.

state may subject such property to judicial process to answer demands made against him in his absence, according to any practicable method that reasonably may be adopted. A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the states as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law, even if it be taken with its ancient incident of requiring security from a defendant who after seizure of his property comes within the jurisdiction and seeks to interpose a defense. The condition has a reasonable relation to the conversion of a proceeding *quasi in rem* into an action *in personam;* ordinarily it is not difficult to comply with—a man who has property usually has friends and credit—and hence in its normal operation it must be regarded as a permissible condition; and it cannot be deemed so arbitrary as to render the procedure inconsistent with due process of law when applied to a defendant who, through exceptional misfortune, is unable to furnish the necessary security; certainly not where such a defendant, as is the case now presented, so far as the record shows, has acquired the property right and absented himself from the state after the practice was established, and hence with notice that his property situate there would be subject to disposition under foreign attachment by the very method that afterwards was pursued, and that he would have no right to enter appearance and make defense except upon giving security.

"However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform. For instance, it does not constrain the states to accept particular modern doctrines of equity, or adopt a combined system of law and equity procedure, or dispense with all necessity for form and method in pleading, or give untrammeled liberty to make amendments. Neither does it, as we think, require a state to relieve the hardship of an

> ancient and familiar method of procedure by dispensing with the exaction of special security from an appearing defendant in foreign attachment."

Mr. Justice McReynolds confined his concurrence to the result and Chief Justice White and Mr. Justice Clarke dissented.[43]

One of the objections to the Act of Congress regulating rents in the District of Columbia was stated and answered by Mr. Justice Holmes in *Block* v. *Hirsh*[44] as follows:

> "The statute is objected to on the further ground that landlords and tenants are deprived by it of a trial by jury on the right to possession of the land. If the power of the commission established by the statute to regulate the relation is established, as we think it is, by what we have said, this objection amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable. While the act is in force there is little to decide except whether the rent allowed is reasonable, and upon that question the courts are given the last word. A part of the exigency is to secure a speedy and summary administration of the law, and we are not prepared to say that the suspension of ordinary remedies was not a reasonable provision of a statute reasonable in its aim and intent."[45]

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[43] The eligibility of women for jury service is considered in 19 MICH. L. REV. 662, 5 MINN. L. REV. 318, and 69 U. PA. L. REV. 386; the extent to which the legislature may regulate judicial procedure, in 34 HARV. L. REV. 424, 434; the validity of court rules when in opposition to statute, in 5 MINN. L. REV. 73; the power of a provost martial during riots, in 15 ILL. L. REV. 469; the relation between civil and military courts, in 15 ILL. L. REV. 334. In 19 MICH. L. REV. 445 is a discussion of a decision holding that an allowance for expenses is not an increase in the compensation of a judge.

[44] 256 U. S. —, 41 Sup. Ct. 458 (1921), 20 MICH. L. REV. 9, 274.

[45] Berger v. United States, 255 U. S. 22, 41 Sup. Ct. 230 (1921), interpreting the federal statute disqualifying a judge against whom an affidavit of personal prejudice and bias is filed, is discussed in 21 COLUM. L. REV. 387, 16 ILL. L. REV. 143, 19 MICH. L. REV. 637, 6 VA. L. REG. n. s. 938, and 7 VA. L. REV. 547. In 6 CORNELL L. Q. 117 is a note on disqualification of a judge for relationship to attorney; in 34 HARV. L. REV. 216 one on disqualification for relationship to party; in 30 YALE L. J. 305 one on disqualification for interest in the cause.

In re Peterson, 253 U. S. 300, 40 Sup. Ct. 543 (1920), 19 MICH. L. REV.

4. *Faith and Credit to Proceedings of Sister States*

No cases which technically fall under this head were decided during the past term, but issues of *res adjudicata* involving analogous principles appear in various decisions. *Supreme Tribe of Ben Hur* v. *Cauble*[46] held that all members of a class are privies to a class suit and bound by the decree, since otherwise the "unfortunate situation may result in the determination of the rights of most of the class by a decree rendered upon a theory which may be repudiated in another forum as to a part of the same class." *Oklahoma* v. *Texas*[47] held the plaintiff state concluded by a decree in a former boundary suit brought against the defendant state by the United States prior to the admission of Oklahoma to statehood. *Privett* v. *United States*[48] held the United States not bound by a decree in a former suit brought by Indians to cancel patents since it was not a formal party and has an interest in the enforcement of the restrictions against alienation which is distinct from that of the Indians. *Economy Light and Power Co.* v. *United States*[49] held the United States not concluded by a decree in a suit brought by a state to determine whether a river is a navigable water of the United States. *New Orleans Land Co.* v. *Leader Realty Co.*[50] found that a prior decree ordering a sale of land was not an adjudication *in rem* and so did not conclude third parties claiming an interest in the land. *Hartford Life Insurance Co.* v. *Blincoe*[51] found that an issue determined by a state court on a retrial after a prior decision had been reversed by the Supreme

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308, allowing the appointment of an auditor in an action at law in the federal courts, is treated in 20 COLUM. L. REV. 805; 34 HARV. L. REV. 321, 338; and 6 VA. L. REG. n. s. 296. Questions of federal procedure are discussed in Charles C. Moore, "Proposed Bill Regulating Federal Appellate Procedure," 24 LAW NOTES 148; notes on uniform federal procedure, in 20 COLUM. L. REV. 906 and 7 VA. L. REG. n. s. 48; and notes on the constitutionality of partial new trials on the question of damages only, in 34 HARV. L. REV. 71, 86; 5 MINN. L. REV. 144; and 69 U. PA. L. REV. 71.

[46] Note 21, *supra*.

[47] Note 28, *supra*.

[48] 256 U. S. —, 41 Sup. Ct. 455 (1921).

[49] 256 U. S. 113, 41 Sup. Ct. 409 (1921), 20 MICH. L. REV. 135.

[50] 255 U. S. 266, 266, 41 Sup. Ct. 259 (1921).

[51] Note 3, *supra*. See 30 YALE L. J. 765.

Court was a new issue not previously passed upon by the Supreme Court and one which depended on state law on which the state court is the final authority. The case illustrates the distinction between what is a bar to a subsequent action after a former one has been finally concluded and what is the law of a case for a retrial.[52]

IX. Administrative Power and Procedure

Since the principle of the separation of powers is assumed to be part of the constitutional structure of the national government, questions of the validity and effect of administrative action concern constitutional law indirectly if not directly. During the past term of court power exercised by administrative officers was held to be within their statutory authority in *La Motte* v. *United States*,[53] *Stoehr* v. *Wallace*,[54] *United States* v. *Bowling*,[55] and *Milwaukee Publishing Co.* v. *Burleson*,[56] but beyond the authority delegated in *Payne* v. *Central Pacific Ry. Co.*,[57] *Payne* v. *Newton*,[58] and *Sutton* v. *United States*.[59] Executive interpretation of a treaty was accorded weight and followed in *Sullivan* v. *Kidd*;[60] administrative

[52] Kenney v. Supreme Lodge, 252 U. S. 411, 40 Sup. Ct. 371 (1920), 19 Mich. L. Rev. 311, holding that a state must give effect to a judgment of a sister state on a cause of action that could not have been sued on in the second state, is treated in 3 Ill. L. Bull. 68. For discussions of the full faith and credit clause see Mayer C. Brown, "The Validity of a Michigan Divorce Decree in Foreign States and Foreign Countries," 4 Bi-Month. L. Rev., No. 5, page 36; John T. Richards, "The Full Faith and Credit Clause of the Federal Constitution as Applied to Suits for Divorce," 15 Ill. L. Rev. 259; and notes on the recognition of foreign divorce decrees in 21 Colum. L. Rev. 98 and 6 Cornell L. Q. 323. Questions of conflict of laws are treated in notes in 21 Colum. L. Rev. 366 on statutes of limitations, in 21 Colum. L. Rev. 585 on usury, in 21 Colum. L. Rev. on foreign recording acts after removal of chattels, in 34 Harv. L. Rev. 553 on the recognition of foreign judgments, in 19 Mich. L. Rev. 220 on suits by foreign executors, in 19 Mich. L. Rev. 344 on statutes disinheriting an heir who kills his ancestor, and in 30 Yale L. J. 860 on foreign judgments in interpleader.

[53] 254 U. S. 570, 41 Sup. Ct. 204 (1921), 20 Mich. L. Rev. 11.

[54] 255 U. S. 239, 41 Sup. Ct. 293 (1921), 20 Mich. L. Rev. 5.

[55] 256 U. S. —, 41 Sup. Ct. 561 (1921).

[56] 255 U. S. 407, 41 Sup. Ct. 352 (1921), 20 Mich. L. Rev. 6.

[57] 255 U. S. 228, 41 Sup. Ct. 314 (1921).

[58] 255 U. S. 438, 41 Sup. Ct. 368 (1921).

[59] 256 U. S. —, 41 Sup. Ct. 563 (1921).

[60] 254 U. S. 433, 41 Sup. Ct. 158 (1921).

construction of statutes was held persuasive and adopted in *Blanset* v. *Cardin*,[61] *McLaren* v. *Fleischer*,[62] and *Culpepper* v. *Ocheltree*,[63] but rejected as erroneous in *Payne* v. *Newton*[64] and *Payne* v. *Central Pacific Ry. Co.*[65] Administrative findings were accorded respect and accepted in *Edward Rutledge Timber Co.* v. *Farrell*,[66] *Milwaukee Publishing Co.* v. *Burleson*,[67] and *Seaboard Air Line Ry. Co.* v. *United States*.[68] Failure of administrative authorities to take action was held a bar to the desires of petitioners in *Economy Light & Power Co.* v. *United States*,[69] *Chase, Jr.*, v. *United States*,[70] and *Gilpin* v. *United States*,[71] but not in *Wyoming* v. *United States*[72] and *Payne* v. *New Mexico*.[73] An administrative construction of a statute was held in *Hall* v. *Payne*[74] not to be arbitrary or capricious and therefore to be not subject to control by mandamus. Whether it might be rejected in proper proceedings was neither denied nor affirmed.

A constitutional issue as to the adequacy of administrative procedure was raised in *Milwaukee Publishing Co.* v. *Burleson*,[75] which held that due process was satisfied by the hearing accorded to the publisher of a newspaper before an assistant postmaster general in which there was full opportunity to urge that the paper was not guilty of utterances warranting a revocation of its second-class mailing privilege. In reviewing the conclusion reached, the court proceeded upon the principle that it must stand unless the court is clearly convinced that it is wrong. Mr. Justice Brandeis, in dissenting, raised constitutional objections to the power exercised and

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[61] 256 U. S. —, 41 Sup. Ct. 519 (1921).
[62] 256 U. S. —, 41 Sup. Ct. 577 (1921).
[63] 256 U. S. —, 41 Sup. Ct. 579 (1921).
[64] Note 58, *supra*.
[65] Note 57, *supra*.
[66] 255 U. S. 268, 41 Sup. Ct. 328 (1921).
[67] Note 56, *supra*.
[68] 254 U. S. 57, 41 Sup. Ct. 24 (1921).
[69] 256 U. S. 113, 41 Sup. Ct. 409 (1921), 20 MICH. L. REV. 135.
[70] 256 U, S, 1, 41 Sup. Ct. 417 (1921).
[71] 256 U. S. 10, 41 Sup. Ct. 419 (1921).
[72] 255 U. S. 489, 41 Sup. Ct. 393 (1921).
[73] 255 U. S. 367, 41 Sup. Ct. 333 (1921).
[74] 254 U. S. 343, 41 Sup. Ct. 131 (1920).
[75] Note 56, *supra*. See 21 COLUM. L. REV. 715.

the action taken, but did not contend that the administrative procedure was inadequate if administrative action was fitting. Questions of administrative procedure in the assessment of state taxes were passed upon in *Turner* v. *Wade*[76] and *St. Louis-San Francisco Ry. Co.* v. *Middlekamp*,[77] already considered in the section on taxation.[78]

Some question as to the power of a state to delegate to a board discretion to direct the removal of grade crossings was raised in *Erie R. Co.* v. *Board of Public Utility Commissioners*,[79] but Mr. Justice Holmes answered:

> "The state courts seem to regard the words as imposing a positive duty, but upon either construction we perceive no infraction of the company's constitutional rights. If the words are imperative the reasons that we have given apply. If they leave a discretion it is subject to review by the courts, and this court has no concern with the question how far legislative or quasi-legislative powers may be delegated to a commission or board."

Examples of the delegation of power to state administrative authorities appear in *Johnson* v. *Maryland*,[80] *Nicchia* v. *New York*,[81] *Thornton* v. *Duffy*,[82] *Lower Vein Coal Co.* v. *Industrial Board*,[83] *Quong Ham Wah Co.* v. *Industrial Accident Commission*,[84] already reviewed, and also in many of the cases involving the regulation of public utilities. The administrative power sustained in *Block* v. *Hirsh*[85] was to modify the terms of existing leases which condi-

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[76] 254 U. S. 64, 41 Sup. Ct. 27 (1920), 20 MICH. L. REV. 162.

[77] 256 U. S. —, 41 Sup. Ct. 489 (1921), 20 MICH. L. REV. 162.

[78] Federal Trade Commission v. Gratz, 253 U. S. 421, 40 Sup. Ct. 572 (1920), 19 MICH. L. REV. 23, 316, is discussed in 20 COLUM. L. REV. 806 and 6 CORNELL L. Q. 320; Cameron v. United States, 252 U. S. 450, 40 Sup. Ct. 410 (1920), 19 MICH. L. REV. 319, in 9 CALIF. L. REV. 433. An English decision on hearing in deportation cases is noted in 30 YALE L. J. 426.

[79] 254 U. S. 394, 41 Sup. Ct. 169 (1921), 20 MICH. L. REV. 283, 286.

[80] 254 U. S. 51, 41 Sup. Ct. 16 (1920), 20 MICH. L. REV. 265.

[81] 254 U. S. 228, 41 Sup. Ct. 103 (1920), 20 MICH. L. REV. 170, 265.

[82] 254 U. S. 361, 41 Sup. Ct. 137 (1920), 20 MICH. L. REV. 267.

[83] 255 U. S. 144, 41 Sup. Ct. 252 (1921), 20 MICH. L. REV. 269.

[84] 255 U. S. 445, 41 Sup. Ct. 373 (1921), 20 MICH. L. REV. 271.

[85] Note 44, *supra*.

tion the rights of tenants to continue occupancy. The constitutionality of the delegation was affirmed as an incident to the general power to regulate the relation between landlord and tenant. Questions of statutory construction as to the method of securing judicial review of commission action are considered in *Vandalia R. Co.* v. *Schnull*[86] and *Hollis* v. *Kutz*.[87] *In re State of New York (The Queen City)*[88] accepts the suggestion of the attorney general of the state that a ship belongs to the state as a proper mode of presenting the issue to the court.[89]

A few stray adjudications on matters relating to the administration of the national government may be mentioned. *Krichman* v. *United States*[90] holds that a baggage porter on a railroad under federal control is not an officer of the United States within the meaning of a statute punishing bribery of officers.[91] *Western Union Telegraph Co.* v. *Poston*,[92] *Missouri Pacific R. Co.* v. *Ault*,[93] and *Norfolk-Southern R. Co.* v. *Owen*[94] reaffirm the principle that the

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[86] 255 U. S. 113, 41 Sup. Ct. 324 (1921), 20 MICH. L. REV. 279.

[87] 255 U. S. 452, 41 Sup. Ct. 371 (1921), 20 MICH. L. REV. 282.

[88] Note 32, *supra*.

[89] Questions of administrative law are considered in Walter Carrington, "Delegation of Power to Boards and Commissions," 6 VA. L. REG. n. s. 801; Laurence Curtis, 2d, "Judicial Review of Commission," 34 HARV. L. REV. 862; Nathan Isaacs, "Judicial Review of Administrative Findings," 30 YALE L. J. 781; and notes in 6 CORNELL L. Q. 325 on injunction against referendum election; in 15 ILL. L. REV. 400 and 19 MICH. L. REV. 211 on delegating to fire marshal power to designate dangerous buildings; in 15 ILL. L. REV. 223 on delegation of judicial power; in 19 MICH. L. REV. 213 on making state medical association the state board of health; in 19 MICH. L. REV. 648 on giving to police commissioner control of licensing private detectives; in 19 MICH. L. REV. 640 on arbitrary power to revoke licenses to sell soft drinks; in 5 MINN. L. REV. 569 on finality of administrative determinations under Torrens land system; in 69 U. PA. L. REV. 152 on conclusiveness of a sheriff's return; and in 27 W. VA. L. Q. 84, 92, on judicial control of administrative judgment as to the validity of bonds.

[90] 256 U. S. —, 41 Sup. Ct. 514 (1921).

[91] The question whether an inspector of the Fleet Corporation is an officer of the United States is considered in 21 COLUM. L. REV. 485; the personal liability of a justice of the peace for his official neglects in 34 HARV. L. REV. 219, 5 MINN. L. REV. 482, and 7 VA. L. REV. 558.

[92] 256 U. S. —, 41 Sup. Ct. 598 (1921).

[93] Note 38, *supra*.

[94] 256 U. S. —, 41 Sup. Ct. 597 (1921).

United States cannot be sued without its consent.[95] In *United States* v. *Diamond Coal & Coke Co.*[96] it is affirmed that laches may deprive the United States of the privilege of invoking the equitable principle suspending the statute of limitations in actions for fraud until the fraud is discovered. It was held, however, that there was no laches where the fraud was clandestine. *Harris* v. *District of Columbia*[97] holds that a municipal corporation is immune from liability for injuries caused by the fault of employees engaged in sweeping the streets.[98]

X. Intergovernmental Relations

Several cases presented the question whether state police measures were unconstitutional interferences with the exercise of the

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[95] The consent of the United States to be sued is considered in Judson A. Crane, "Jurisdiction of the United States Court of Claims," 34 Harv. L. Rev. 161.

[96] 255 U. S. 323, 41 Sup. Ct. 335 (1921).

[97] 256 U. S. —, 41 Sup. Ct. 610 (1921).

[98] The tort liability of municipal corporations is considered in notes in 20 Colum. L. Rev. 772; 6 Cornell L. Q. 207; 34 Harv. L. Rev. 66, 91; 19 Mich. L. Rev. 569, 758; 5 Minn. L. Rev. 326; 7 Va. L. Rev. 383, 562; 27 W. Va. L. Q. 94; and 30 Yale L. J. 87, 303, 425.

For other discussions of the law of municipal corporations, see 9 Calif. L. Rev. 161, 19 Mich. L. Rev. 352, and 30 Yale L. J. 304 on power to act beyond boundaries; 20 Colum. L. Rev. 799 on proper park purposes; 21 Colum. L. Rev. 99 on use of streets for private purposes; 21 Colum. L. Rev. 490 on acquisition of highway by prescription; 34 Harv. L. Rev. 439 on liability for services under void contract; 34 Harv. L. Rev. 439 on power to authorize nuisances in streets; 16 Ill. L. Rev. 130 on vacation of streets; 19 Mich. L. Rev. 570 on letting contracts to lowest bidder; 19 Mich. L. Rev. 757 on power to act as trustee; 19 Mich. L. Rev. 884 on implied powers and ultra vires; 5 Minn. L. Rev. 151 on whether paving law is an uniform law; 30 Yale L. J. 302 on liability to garnishment; and 30 Yale L. J. 420 on estoppel against a municipality.

For want of a better place, mention may here be made of William Anderson, "The Constitution of Minnesota," 5 Minn. L. Rev. 407; W. L. Jenks, "History of Michigan Constitutional Provision Prohibiting a General Revision of the Laws," 19 Mich. L. Rev. 615; Willard L. King, "Draftsmanship of the [Illinois] Constitution of 1870," 15 Ill. L. Rev. 447; Urban A. Lavery, "Revising a Constitution," 15 Ill. L. Rev. 437; Leonard D. White, "The New Hampshire Constitutional Convention," 19 Mich. L. Rev. 383; and a note in 21 Colum. L. Rev. 182 on proportional representation.

powers of the national government. *Johnson* v. *Maryland*[99] held that a state may not require the driver of a mail truck to pass a test to determine his qualifications. It is the duty of the post office department to employ competent persons, declared Mr. Justice Holmes, and it must be presumed that this duty has been performed. While the states may incidentally affect the action of drivers of mail wagons as by regulating the mode of turning corners, it cannot go so far as to dictate the selection of employees of the United States government. State efforts to interrupt the acts of the federal government itself are subject to greater limitations than are efforts to regulate persons employed in interstate commerce, so that what may be held to affect interstate commerce only indirectly or incidentally will be regarded as a direct and unconstitutional interference with the federal government when applied to the execution of federal functions. Justices Pitney and McReynolds dissented.

In *Gilbert* v. *Minnesota*[100] the majority of the court found no interference with the federal government in a state law forbidding persons to teach that citizens should not enlist in the army or navy or should not assist the United States in time of war. Mr. Justice McKenna found the statute one in aid of the national government and not a hindrance to the execution of its powers and its policies. In dissenting, Mr. Justice Brandeis pointed out that the state statute was not confined to time of war and insisted that it might be the policy of the national government to have military and naval forces composed of volunteers who had enlisted after full consideration of the arguments against such participation. With such freedom of consideration the state statute would interfere. It also went beyond congressional legislation in prohibiting the teaching of doctrine, while Congress had confined its prohibitions to tangible obstructions. The state law might well promote disaffection which Congress sought to avoid by less drastic regulation. Congress by failure to impose prohibitions indicated its will that the action of the citizen should be untrammelled. Chief Justice White in a brief separate dissent expressed the opinion that "the subject matter is

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[99] 254 U. S. 51, 41 Sup. Ct. 16 (1920), 20 MICH. L. REV. 265. See 21 COLUM. L. REV. 93, 34 HARV. L. REV. 434, 7 VA. L. REV. 311, and 30 YALE L. J. 426.

[100] 254 U. S. 325, 41 Sup. Ct. 125 (1920), 20 MICH. L. REV. 10, 265.

within the exclusive legislative power of Congress, when exerted, and that the action of Congress has covered the whole field."

A state law regulating the sale of habit-forming drugs was sustained in *Whipple* v. *Martinson*[101] as against the objection that it interfered with the enforcement of the federal statute imposing a tax on prescribers and dispensers of such drugs. The state law forbade certain acts which the prohibitory provisions of the federal law did not forbid, provided records were kept of them, but this difference was held to impose an impediment to the enforcement of the federal law. Mr. Justice Day recognized the validity of the principle relied on by the drug dispenser, but found no ground for its application to the statute before the court.

Several cases involved the applicability of state power to the railroads while under federal control. Congress had permitted the continued application of state police measures and state tax laws. An objection to a state franchise tax was held unfounded in *St. Louis-San Francisco Ry. Co.* v. *Middlekamp*.[102] That the congressional consent to apply the police laws of the state does not extend to laws imposing penalties for delay in paying wages was held in *Missouri Pacific R. Co.* v. *Ault*[103] and *Norfolk-Southern R. Co.* v. *Owens*,[104] and it was declared to be a question of federal and not of state law whether an imposition is penal or compensatory. The companies were held not liable on common law principles, since after the assumption of federal control the defaults complained of were not their defaults. The lack of power to enforce state laws not sanctioned by Congress was predicated upon the impossibility of suing the United States government without its consent. So also in *Western Union Telegraph Co.* v. *Poston*,[105] Mr. Justice Brandeis declared that the common-law immunity of the telegraph companies for acts and omissions of the government is not affected by the fact that it may be impossible to sue the government, and that "if Congress has omitted to provide adequately for the protection of rights of the public, Congress alone can provide the remedy."

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[101] 256 U. S. 41, 41 Sup. Ct. 425 (1921), 20 MICH. L. REV. 158.
[102] 256 U. S. —, 41 Sup. Ct. 489 (1921), 20 MICH. L. REV. 162.
[103] Note 8, *supra*.
[104] 256 U. S. —, 41 Sup. Ct. 597 (1921).
[105] 256 U. S. —, 41 Sup. Ct. 598 (1921).

The doctrine that a receiver appointed by a federal court takes subject to all prior liens was invoked in *Marshall* v. *New York*[106] for the decision that the common-law priority lien of a state for unpaid taxes may be enforced against property in the custody of a federal receiver. A state requirement that an international bridge be altered to provide additional accommodations was held in *International Bridge Co.* v. *New York*[107] to be unimpeded by the fact that part of the land under the bridge had been conveyed to the United States, when the purpose of the conveyance was unconnected with the administration of the government.

State taxation of banks chartered by the federal government was declared unconstitutional in two cases. In *Smith* v. *Kansas City Title & Trust Co.*[108] Mr. Justice Day, in affirming the power of Congress to exempt from state taxation the capital, surplus, income and mortgages of federal land banks and joint-stock land banks, referred to previous declarations "that the states were wholly without power to levy any tax directly or indirectly upon national banks, their property, assets or franchises, except so far as the permissive legislation of Congress allowed such taxation." This principle was the basis of the decision in *Merchants National Bank of Richmond* v. *Richmond,*[109] which held that a state could not impose a higher rate on national bank stock than on money loaned at interest by individuals, since Congress had qualified its permission to tax bank stock by the provision that the tax should not be "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state" and money loaned at interest is one kind of moneyed capital which Congress had in mind by "other moneyed capital."[110]

One of the grounds of resistance to a special assessment in *Choctaw, O. & G. R. Co.* v. *Mackey*[111] was that the complaining railroad was an instrumentality of the federal government for developing Indian coal lands; but Mr. Justice Brandeis answered that "the mere

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[106] Note 7, *supra.*

[107] 254 U. S. 126, 41 Sup. Ct. 56 (1920), 20 MICH. L. REV. 141, 285.

[108] Note 13, *supra.*

[109] 256 U. S. —, 41 Sup. Ct. 619 (1921), 20 MICH. L. REV. 172.

[110] An analogous issue is considered in Montgomery B. Angell, "State Usury Laws and the Federal Reserve Banks," 7 VA. L. REV. 536.

[111] 256 U. S. —, 41 Sup. Ct. 582 (1921), 20 MICH. L. REV. 169.

fact that property is used, among others, by the United States as an instrument for effecting its purpose does not relieve it from state taxation."

Turning to federal powers alleged to interfere unconstitutionally with state functions, *New York Trust Co.* v. *Eisner*[112] holds that the federal estates tax does not interfere with the power of the states to regulate descent and distribution. It had been held that no such interference was wrought by a federal legacy tax, but it was here argued that the estates tax is different since it "is cast upon a transfer while it is being effectuated by the state itself and therefore is an intrusion upon its processes." To this Mr. Justice Holmes answered that "if a tax on the property distributed by the laws of the state, determined by the fact that distribution has been accomplished, is valid, a tax determined by the fact that distribution is about to begin is no greater interference and is equally good."[113]

That the federal courts have no jurisdiction to entertain a suit against a state is established by the Eleventh Amendment and by inference drawn therefrom as to suits not expressly within its terms. The principle is applied to suits otherwise within the admiralty jurisdiction in *In re State of New York (Petition of Walsh)*[114] as to an action *in personam,* and in *In re State of New York (The Queen City)*[115] as to an action *in rem.*[116]

Relations between states were involved in suits to which states were parties. *New York* v. *New Jersey*[117] held that a state may enjoin a neighboring state from polluting intervening waters by sewage, but found the alleged pollution not established. *Oklahoma* v. *Texas*[118] held the plaintiff state concluded by the determination of a boundary in a prior suit between the defendant and the United

[112] 256 U. S. —, 41 Sup. Ct. 506 (1921), 20 MICH. L. REV. 155.

[113] Federal taxation of income from state bonds is considered in Alexander M. Hamburg, "Exemption of State and Municipal Securities from Federal Income Taxation," 7 VA. L. REV. 195; Harry Hubbard, "From Whatever Source Derived," 6 A. B. A. JOUR. 203; and a note in 7 VA. L. REV. 136.

[114] Note 24, *supra.*

[115] Note 25, *supra.*

[116] The power of the federal courts to enjoin the enforcement of judgments obtained in state courts is considered in 15 ILL. L. REV. 466.

[117] Note 27, *supra.*

[118] Note 28, *supra.*

States before the plaintiff was a state. Another part of the controversy still remained open, and in this various orders were issued in *Oklahoma* v. *Texas*.[119] A report of commissioners locating a boundary in accord with an earlier decree was confirmed in *Arkansas* v. *Mississippi*.[120]

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[119] Note 29, *supra*.
[120] Note 30, *supra*.